Supreme Court, U.S.
FILED
FEB 28 1980

No. 79-1128

In the Supreme Court of the United States

OCTOBER TERM, 1979

THE STATE OF MONTANA, ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA and
THE CROW TRIBE OF INDIANS, MONTANA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

ROBERT L. KLARQUIST
STEVEN E. CARROLL
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2) is reported at 604 F.2d 1162. The opinion of the district court (Pet. App. 27) is reported at 457 F. Supp. 599. An earlier opinion of the court of appeals in a related case, *United States* v. *Finch* (Pet. App. 56) is reported at 548 F.2d 822. The opinion of this Court in the *Finch* case is reported at 433 U.S. 676.

JURISDICTION

A modified opinion on petition for rehearing (Pet. App. 2), and an opinion denying rehearing (Pet. App. 24) were entered by the court of appeals on September 20, 1979. The petition for a writ of certiorari was filed on January 21, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the bed and banks of the Big Horn River within the exterior boundaries of the Crow Indian Reservation are held in trust by the United States for the Crow Tribe of Indians.

2. Whether federal or state law defines the extent of federal patents of lands riparian to the Big Horn River wholly within the Reservation.

3. Whether Crow Tribal Ordinance 74-05, as modified by the court of appeals, is a valid exercise of tribal authority.

TREATIES AND STATUTES INVOLVED

The principal statutes and treaties involved are set forth in the appendix to the petition (Pet. App. 83-120). Other relevant statutes are set out in the petition (Pet. 4-6).

STATEMENT

1. The present Crow Reservation in Montana is a part of the large area, encompassing some 38 million acres, recognized as belonging to the Crow Tribe

by the First Treaty of Fort Laramie in 1851. Pet. App. 83-87.[1] Although distinct territories were assigned to the other seven signatory tribes, the treaty expressly preserved, for each of the tribes, the "privilege of hunting [and] fishing" within the entire area confirmed as Indian country. Pet. App. 86. In 1868, by the Second Treaty of Fort Laramie (Pet. App. 88-95), the Crows ceded some 30 million acres to the United States, and the balance of their former territory was "set apart for [their] absolute and undisturbed use and occupation," the United States "solemnly agree[ing] that no persons [other than authorized government agents] shall ever be permitted to pass over, settle upon, or reside in the territory" described. Article 2, Pet. App. 89-90. The reservation was to be the "permanent home" of the Crow, but they retained "the right to hunt on unoccupied lands of the United States so long as game may be found thereon." Article 4, Pet. App. 90. Finally, the treaty stipulated that no part of the reserved lands could validly be ceded unless at least a majority of the adult members agreed. Article 11, Pet. App. 95.

Article 2 of the 1868 Treaty (Pet. App. 89) describes the boundary of the Crow Reservation as follows:

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[1] The several boundaries of the Crow Reservation from 1851 to the present are shown on the sketch map reproduced as an appendix to this brief. The map summarizes the several maps appended to the opinion of the district court in *United States* v. *Finch*, 395 F. Supp. 205, 215-220 (D. Mont. 1975).

> * * * commencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning * * *

This description, on its face, includes one-half of the Yellowstone River, a navigable stream, as part of the Reservation. The Big Horn River, a navigable tributary of the Yellowstone, is entirely included up to the Montana-Wyoming boundary.[2]

Subsequently, substantial additional territory was ceded to the United States, ultimately reducing the reservation to 2,282,764 acres. See Pet. 8 n.6, 14-15 n.24; Pet. App. 5. In two major transactions, one shortly before and one shortly after Montana became a State in 1889, the lands ceded, where bounded by the Yellowstone River, were described as reaching to "the mid-channel" of that river. Act of April 11, 1882, ch. 74, 22 Stat. 42; Act of March 3, 1891, ch. 543, 26 Stat. 989, 1039. A major stretch of the Big

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[2] We focus on the Treaty of 1868 because, at the latest, that is the Act by which the United States granted or confirmed the bed and banks of the Big Horn River to the Crow Tribe. But it is not irrelevant that the Crow territory, as defined by the Treaty of 1851, surrounded the entire course of the Big Horn River from its source to its mouth, and also most of the Yellowstone River. See Appendix, *infra*.

Horn River remains surrounded by the Crow lands. See Appendix, *infra*.

In due course, the reservation was in large part allotted to individual members of the Tribe. Some of the allotments were ultimately purchased by the State of Montana and the State now holds several riparian tracts along the Big Horn River. See Pet. App. 5, 77. Substantial acreage is today held in fee by non-Indians. Pet. App. 5.

In 1973 the Crow Tribal Council adopted an ordinance which purports to prohibit hunting and fishing throughout the reservation except by members of the Tribe. Pet. App. 5-6 and n.4, 119-120. At the same time, the State claims authority to license and regulate hunting and fishing within the Reservation by non-members. Pet. App. 5-6.

2. The United States filed this action on October 9, 1975, seeking a judgment declaring that the United States holds title to the bed and banks of the Big Horn River within the exterior boundaries of the Crow Reservation in trust for the Crow Tribe and that the Tribe enjoys exclusive authority to regulate hunting and fishing within the Reservation. The case parallelled *United States* v. *Finch*, a criminal prosecution under 18 U.S.C. 1165 then pending in the same district court, to ensure that the like issues there presented would be decided if the prosecution failed on other grounds. As it happens, the district court in *Finch*, 395 F. Supp. 205 (D. Mont. 1975), declared that the bed of the Big Horn River belonged to the

State of Montana and that Finch, a non-Indian, therefore could not be convicted of trespassing upon Indian-owned land by fishing on the Big Horn River within the Reservation. The court of appeals reversed, 548 F.2d 822 (9th Cir. 1977) (Pet. App. 52-86), concluding that the bed and banks of the Big Horn River within the Crow Reservation were trust lands held by the United States for the Crow Tribe. But this Court summarily reversed on double jeopardy grounds, 433 U.S. 676 (1977), without referring to the other issues. The present case was then pursued.

On August 1, 1978, the district court, adhering to its *Finch* decision, held that: (1) title to the riverbed is in the State of Montana; (2) the State has exclusive jurisdiction to regulate non-Indian hunting and fishing on fee patented lands on the Reservation; (3) the State and the United States, pursuant to 18 U.S.C. 1165, have concurrent jurisdiction to regulate non-Indian hunting and fishing on trust lands within the Reservation; (4) the Crow Tribe's exclusive right to hunt and fish on its Reservation is restricted to trust lands; and (5) the Tribe's regulatory authority on the Reservation is limited to the right to grant or withhold permission to non-Indians to trespass upon trust lands for the purpose of hunting and fishing (Pet. App. 54-55).

On appeal, the Ninth Circuit reversed, and again ruled that the bed and banks of the Big Horn River are held in trust by the United States for the Crow

Tribe; that the Tribe can prohibit non-resident non-Indian hunting and fishing on all lands on the Reservation; but that the Tribe cannot prohibit non-Indian residents from hunting and fishing on their own lands within the Reservation, although they can be made subject to non-discriminatory tribal regulation. The court went on to hold that Montana may regulate non-Indian hunting and fishing on the Reservation so long as State regulation does not interfere with the tribal regulatory program. In effect, the non-Indian is bound to observe the stricter of the two sets of regulations. Finally, the court held that the State cannot regulate directly or indirectly hunting and fishing by members of the Tribe on the Reservation.

The United States filed a motion for reconsideration on three issues: the tribal power to regulate non-member hunting and fishing; the availability of civil forfeiture as a tribal enforcement mechanism; and the existence vel non of concurrent state jurisdiction over non-member hunting and fishing. The petitioners also sought reconsideration, asserting that *Wilson* v. *Omaha Tribe*, No. 78-160 (June 20, 1979), required the application of state law to define the extent of federal patents of land riparian to the Big Horn River. The amended opinion of the court of appeals (Pet. App. 2) denied both petitions for rehearing. See, also, Pet. App. 24.

ARGUMENT

Although we do not agree with all aspects of its decision, we believe the court of appeals correctly resolved the only issues tendered to this Court by the petition for certiorari. For the most part, moreover, the questions presented here turn on the special facts of the case. There is no conflict of decisions. Accordingly, the challenged rulings do not call for review by this Court.

1. Petitioners first (Pet. 10-17) assail the holding of the court of appeals that the bed of the Big Horn River within the Crow Reservation belongs to the Tribe, rather than the State. This is said to violate the Equal Footing Doctrine, which, it is suggested, absolutely forbade any alienation of the soil beneath navigable rivers by the United States before the future State was admitted to the Union. But that proposition, originating in *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212, 220-230 (1845), was repudiated within five years, *Goodtitle* v *Kibbe*, 50 U.S. (9 How.) 470, 478 (1850), and was definitively rejected before the end of the century, *Shively* v. *Bowlby*, 152 U.S. 1, 47-48, 58 (1894). Consistently since then, the Court has conceded the constitutional power of the United States to grant away, before statehood, the shores and beds of navigable waters. *E.g.*, *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77, 83-85 (1922); *United States* v. *Holt State Bank*, 270 U.S. 49, 54-55 (1926); *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 633, 639 (Doug-

las, J., concurring), 646-647 (White, J., dissenting) (1970). In light of this firmly established jurisprudence, we cannot read the somewhat ambiguous passages from the opinion in *State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372-374 (1977), quoted by petitioners (Pet. 15-16), as intended casually to change so fundamental a rule.

The question actually presented in this case is a much more modest one, which turns on the particular history of the Crow Reservation: whether, in this instance, the United States *intended* to convey, or confirm, to the Tribe the bed of the Big Horn River, or, rather, to reserve it for the benefit of a future State. That narrow issue is of local importance only and, in the absence of any conflict between federal and State courts, does not obviously commend itself for review here. At all events, we believe the court of appeals correctly resolved the question in *United States* v. *Finch*, 548 F.2d 822 (9th Cir. 1976) (Pet. App. 56, 64-76), vacated on other grounds, 433 U.S. 676 (1977), and rightly adhered to that decision in this case (Pet. App. 9).

The controlling precedent is *Choctaw Nation* v. *Oklahoma*, *supra*, in which this Court upheld the claim of Indian tribes that the grant to them of certain lands in Oklahoma should be construed to include the bed of the Arkansas River. To be sure, there the relevant treaty promised—presumably in good faith —that the lands set aside for the Indians would never be embraced within a State. 397 U.S. at 625.

But, in other respects, the present case is a stronger one for the Tribe's claim. Here, the river is not a boundary between discrete Indian territories, but runs through the center of a single "permanent" reservation, from which all non-members are expressly excluded, except specially authorized government officials. Indeed, originally, the river, for its entire course, was surrounded by the Crow lands. In such circumstances, it would make no sense to carve out the Big Horn River from the grant. To do so, moreover, would be wholly inconsistent with the repeated recognition, in the Treaty of 1868 and the Acts of 1882 and 1891, that the Reservation included half the larger Yellowstone River on the north.

There is a further consideration. Here—unlike the *Choctaw* case—the United States was recognizing a reserved portion of the aboriginal Crow lands [3] as belonging to that Tribe and confirming its exclusive rights there. Thus, there was no occasion to "grant" the river bed within that territory to the tribe: it would be retained by the Crow unless ceded by them. Cf. *United States* v. *Winans*, 198 U.S. 371, 381 (1905); *Washington* v. *Fishing Vessel Assn'n*, No. 77-983 (July 2, 1979), slip op. 14.

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[3] The district court noted that the Crow had not always occupied the area in question (Pet. App. 32). But, for our purposes, it is enough that the territory embraced by the present reservation (and much more) was occupied as their exclusive domain well before the Treaty of 1868. The Crow claim to these lands was recognized by the neighboring tribes and by the United States at least as early as 1851. See Pet. App. 4, 10, 65, 70-71.

In sum, the present holding is a faithful application of the principles announced in *Choctaw Nation* and does not call for review in this Court.

2. Petitioners next (Pet. 17-19) argue that the court below violated the rule of *Wilson* v. *Omaha Indian Tribe*, No. 78-160 (June 20, 1979), in fixing the limit of riparian ownership along the Big Horn River in accordance with federal law, at high-water mark, ignoring the Montana law which normally construes riparian grants as reaching to low-water mark. In our view, the court was plainly correct in rejecting this claimed conflict. Pet. App. 24-26.

The present question arises in a very unusual context. Whereas, normally, the State as owner of the bed of a navigable river would have every interest in pressing that claim to high-water mark, as against private riparian owners, *e.g.*, *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313 (1973), here the State itself is in some stretches the upland owner, asserting extensive riparian rights against the owner of the riverbed. For that reason, petitioners focus on the rules governing riparian property. But the matter is more correctly analyzed, it seems to us, by starting with the definition of the riverbed which, in the more usual situation, inures to the State.

This Court has recently emphasized that State ownership of navigable water bottoms derives directly from the Constitution. *State Land Board* v. *Corvallis Sand & Gravel Co.*, *supra*, 429 U.S. at 374. It must follow that the extent of that "grant" is governed by

a uniform rule: the Equal Footing Doctrine requires as much. *Id.* at 376. And that rule has always been understood to encompass "the *shores* of navigable waters," as well as "the soils under them." *Pollard's Lessee* v. *Hagan*, *supra*, 44 U.S. (3 How.) at 230. Thus, at statehood, the new State becomes owner of navigable riverbeds to high-water mark—absent an exceptional previous alienation by the United States —and the United States, as upland owner, enjoys no property rights beyond that point and can convey none.

It is difficult to appreciate why any State should wish to challenge such a favorable rule, save in the atypical situation presented here. Nor is it obvious why the usual rule ought not govern this case. The State's title as riparian owner derives by purchase from a federal patentee, originally a Crow allottee. Although, as owner of both the riverbed and the upland, the United States in this instance was free to convey the shore, there is no reason to construe the present patent as granting more than would be included in every other riparian grant from the national government. No doubt, when it owns the riverbed, the State may grant away a portion of it to the riparian proprietor—whether by special deed or general law—and thereby add to the federal patent. But there can be no justification for such unilateral action when the riverbed, to high-water mark, is held by the United States in trust for an Indian Tribe. Nothing in *Wilson*—or in *Corvallis Sand & Gravel*

Co.—remotely suggests that a State may thus alter the boundary of the federal domain.

3. Finally, there is no substance to the charge (Pet. 19-28) that the court below violated settled principles by recognizing tribal authority over hunting and fishing within the Reservation by non-members. Certainly, there is no conflict with *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1979). The cited decision holds only that Indian tribes cannot assert *criminal* jurisdiction over non-Indians. But neither that case nor any other forecloses Indian tribes from fashioning civil regulations governing activities within their Reservation, binding on non-members, whether outsiders or those who own plots there. On the contrary, "[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations," even when it reaches non-Indians. *Williams* v. *Lee*, 358 U.S. 217, 223 (1959), quoted and applied in *United States* v. *Mazurie*, 419 U.S. 544, 558 (1975). Whatever the limits of the principle, we believe it plainly embraces tribal regulation of hunting and fishing within the Reservation boundaries, so long as the tribe itself does not seek to impose criminal sanctions on non-members. See Pet. App. 19-20.

Strong arguments could be advanced in support of the Crow Tribe's attempt to exclude all non-members, including resident owners, from hunting and fishing. But that question is not presented to this Court, the tribal regulation having been invalidated insofar as

it proscribes hunting and fishing on their own lands by non-member residents of the reservation (Pet. App. 15) and no cross-petition for certiorari having been filed. The court below condoned only exclusion of outsiders (Pet. App. 15) and regulation of hunting and fishing by non-member residents to the extent only that it is "reasonable, non-discriminatory, and consistent with sound principles of conservation" (Pet. App. 23). What is more, the decision concedes the concurrent applicability of State licensing and any more stringent regulation of hunting and fishing by non-members (Pet. App. 20-21). Such a modest accommodation of interests hardly calls for this Court's intervention.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

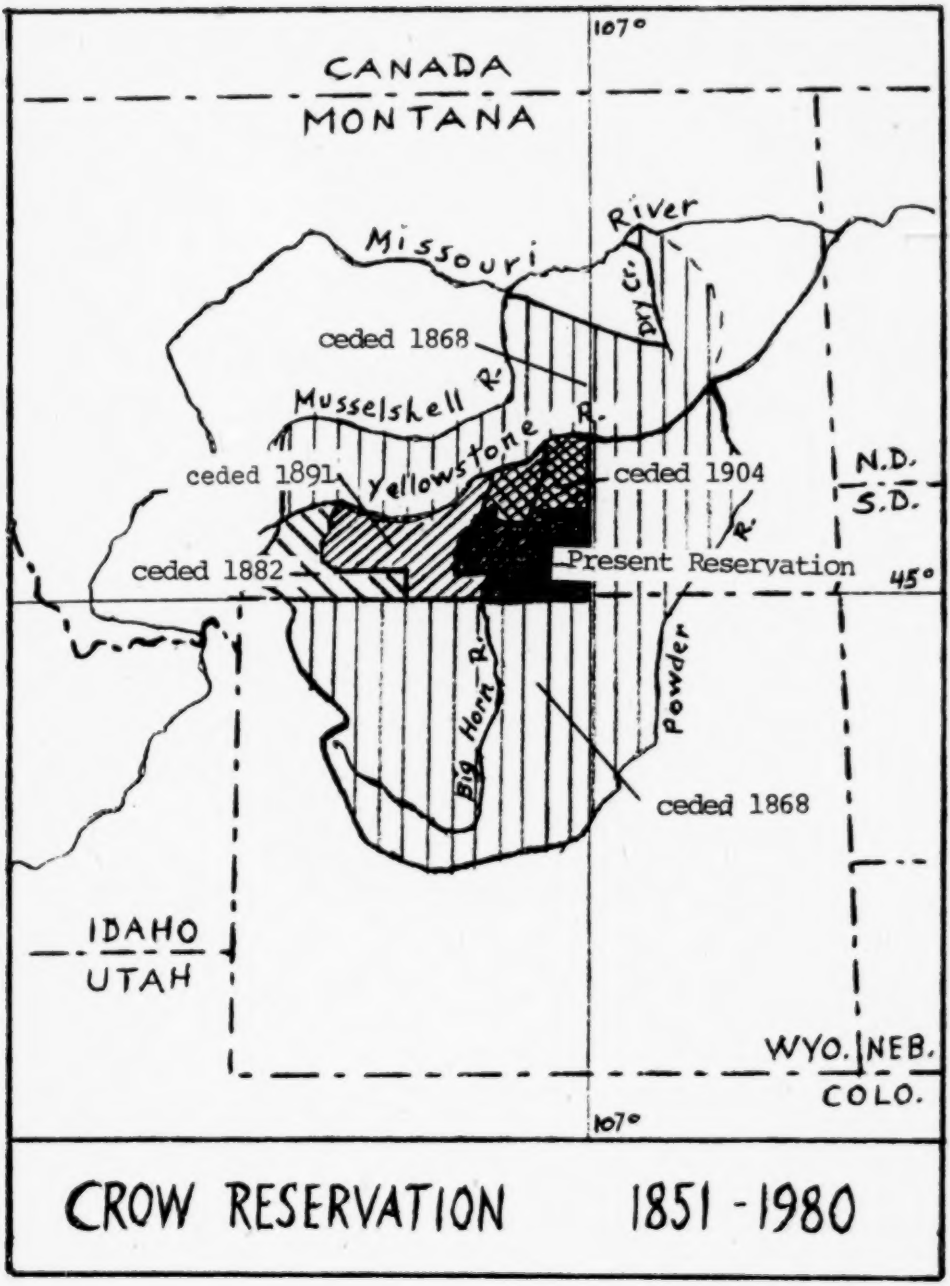
WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

ROBERT L. KLARQUIST
STEVEN E. CARROLL
Attorneys

FEBRUARY 1980



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